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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DONNA RAE WINAUSKI, Plaintiff and Respondent, v. THOMAS EDWARD VERGO, Defendant and Appellant;	B158640, B163839 (Los Angeles County Super. Ct. No. D674614)
LOS ANGELES COUNTY CHILD SUPPORT SERVICES DEPARTMENT, Intervener and Respondent.	

APPEALS from orders of the Superior Court of Los Angeles County. Timothy Murphy and Roberta Lee, Commissioners. Affirmed.

Freda D. Pechner for Defendant and Appellant.

L. Cruz, Deputy Director, Nancy K. Ruffolo, Attorney in Charge and Fesia A. Davenport, Staff Attorney for Intervener and Respondent.

No appearance for Plaintiff and Respondent.

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This case arises out of a divorce proceeding filed in 1965 by respondent Donna Rae Winauski (formerly Vergo, hereafter Donna) against appellant Thomas Edward Vergo (Thomas).[1] In 1967, Thomas was ordered to pay monthly child support for the parties' three children. More than three decades later, Donna sought assistance from the Los Angeles County District Attorney's Office, Bureau of Family Support Operations (FSO) in collecting support payments that she claimed were in arrears. The FSO calculated the arrearages to exceed $100,000, including interest. In 2000, Thomas filed in Department 2E of the Los Angeles Superior Court a motion for equitable relief, to fix arrearages and to quash arrears. In 2002, he filed in Department 7 a motion to set aside the interlocutory and final divorce judgments as void. Each motion was heard by a different commissioner and both motions were denied. Thomas now appeals these denials, and his appeals have been consolidated. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1960's Proceedings

On July 21, 1963, the parties married in Tijuana, Mexico and thereafter held themselves out as husband and wife in Los Angeles, California. Their daughter was born in May 1964 and their first son was born in 1965. On August 27, 1965, Donna filed a complaint for annulment or in the alternative for divorce and requested child support. She alleged that since the marriage, Thomas treated her with extreme cruelty and wrongfully inflicted grievous mental suffering upon her. On the same day, she also filed an order to show cause seeking child support.

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[1] We refer to each party by his or her first name, not out of familiarity or disrespect, but for ease of reference and because such is the preferred practice in family law cases. (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 828, fn. 2; *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

On September 10, 1965, the parties and their counsel appeared in court for the order to show cause hearing. The court ordered Thomas to pay monthly child support in the amount of $75 per child beginning September 20, 1965 and continuing until further court order. On September 24, 1965, Thomas filed an answer and cross-complaint for annulment.

At some point thereafter, the parties began living together again and Donna became pregnant. In February 1967, the parties' youngest son was born. A few months later the parties separated again.

A contested trial was set for October 11, 1967. Donna's attorney, however, sent written notice of an October 8 trial date to Thomas' attorney, Monta Shirley. The minute order dated October 11, 1967 states the following: Thomas and his attorney failed to appear; notice had been given and filed; trial proceeded by default; Thomas was ordered to pay monthly child support for all three children in the amount of $50 per child commencing on October 20, 1967 and continuing until their respective majority or until further court order. The interlocutory judgment of divorce filed October 11, 1967, on the other hand, indicates that Thomas appeared by his attorney, Monta Shirley, and that there was an oral stipulation to a judge pro tempore. A written stipulation for the appointment of a court commissioner as judge pro tempore, which was signed by both parties' counsel but not dated, was also filed on October 11, 1967. On October 19, 1967, the court clerk mailed notice of entry of judgment to both parties' counsel. A final judgment of divorce was entered on July 16, 1968.

Current Proceedings

In November 1999, Donna provided a statement to the FSO claiming that Thomas' child support payments were in arrears from November 1967 through

February 1985, up to the youngest child's 18th birthday.[2] Thereafter, Thomas received notice from the FSO that he owed child support payments in the amount of $32,011.09 plus interest in the amount of $65,693.50 and he later received notice of a levy from his bank.

1. Equitable Motions in Department 2E

On July 25, 2000, Thomas filed a request for judicial determination of support arrearages and a motion to stay the Franchise Tax Board Levy in Department 2E (Title IV court). When he later received notice that his driver's license was being suspended, he moved to stay the suspension until determination of the prior motions. In November 2001, Thomas filed a "Memorandum of Points and Authorities in Support of Motion for Equitable Relief, to Fix Arrearage, and to Quash Arrears," in which he argued that Donna's collection efforts were barred by the equitable defenses of laches and lack of diligence. Donna opposed the motions and filed a declaration claiming that her delay in attempting to collect child support was due to her fear of Thomas. She stated that he had physically abused her during their short marriage and had used cocaine during and after their marriage, and that only with the passage of time and counseling did she obtain the emotional and financial assistance to commence enforcement proceedings. In 1983, she "found the courage" to retain an attorney to pursue collection efforts. She later learned that her attorney had not taken any formal action on her case and that he had been disbarred.

The hearing on Thomas' motions was continued several times. On August 1, 2001, the parties appeared through their counsel, who each signed a form entitled "Advisement of Rights Under Family Code § 4251(b)." The form advised the attorneys that the matter would be heard by a commissioner acting as a temporary

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[2] At the time the judgments were entered, the age of majority was 21 years. It was lowered to age 18 in 1972. (Former Civ. Code, § 25.1; *In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 467.)

judge unless an objection was made before the hearing. The court ordered the release of Thomas' driver's license, ordered Thomas to file an accounting pursuant to Family Code section 17526 and continued the matter for further briefing. On December 13, 2001, the parties and their counsel appeared before Commissioner Roberta Lee in Department 2E, who issued a tentative ruling disallowing Thomas' laches defense and allowing Donna to enforce the support arrearages. The matter was continued for a contested, evidentiary hearing on February 14, 2002.

On February 14, 2002, Thomas' attorney requested a statement of decision and objected to a commissioner hearing the matter. His attorney also requested that findings and an order be prepared pursuant to Family Code section 4251, subdivision (b), which the court denied as untimely. The contested hearing continued over three more days on February 15, April 19 and August 2, 2002. Numerous witnesses testified, including the parties and their children.

On October 29, 2002, the court issued a written order denying Thomas' motion for equitable relief and his requests under Family Code section 4251 and for a statement of decision. The court made several findings in its order. With respect to arrears, the court noted that Thomas was ordered at the August 1, 2002 hearing to file a declaration of arrears by November 1, but he failed to do so. The court found that his testimony regarding child support payments throughout the children's minority was "vague, contradictory and highly improbable [and that it was] rebutted by the credible evidence of [Donna] and the children of the parties." The court therefore adopted the FSO's audit and found that Thomas owed child support arrears in the amount of $100,145.92 as of November 30, 2001. Thomas was also ordered to pay Donna's attorney fees in the amount of $5,000.

With respect to Thomas' laches defense, the court found that "[s]ubstantial credible evidence, especially that of the children of the parties and [Donna], supports [the] findings that [Thomas] was an abusive spouse, had a violent temper, and was an erratic, inappropriate, and, in some instances, abusive parent. It was not unreasonable

for [Donna] to be fearful of [Thomas] and to delay in seeking to recover child support arrears from [Thomas] in view of his violence during the marriage and his on-going inappropriate behavior with the children." The court further found that Thomas' testimony that he made on-going support payments either through the children or his parents or directly to Donna "to be credibly rebutted" by the children and Donna, and that Thomas had failed to meet his burden of showing how much child support he had paid. The court therefore found that "any missing supporting witnesses' testimony would not have been of significant probative value and [Thomas] is not prejudiced by their unavailability" or Donna's delay.

Finally, the court found that while Donna did in fact delay in pursuing enforcement of the support judgments, "the delay is outweighed by [Thomas'] unclean hands; he was abusive to [Donna] and the children both physically and emotionally; he failed to provide adequate support for his three children during their minority although he had knowledge of a court order requiring him to do so; his behavior with his children was inappropriate. A balancing of the equities lies in favor of [Donna]." Thomas appealed this order.

2. Motion to Set Aside Void Judgments in Department 7

In the meantime, on February 4, 2002, Thomas filed a motion to set aside the 1967 interlocutory judgment and 1968 final judgment of divorce as void in Department 7. The motion was based on three grounds: (1) Thomas had failed to receive notice of trial, (2) the relief granted was in excess of that requested in the complaint, and (3) "condonation" or reconciliation was a defense under then existing law. Donna filed a declaration in opposition in which she stated that she remembered seeing Thomas and a man she presumed was his attorney in the courthouse on the day of trial, that she only saw Thomas in the courtroom, but he left before their case was called. On March 11, 2002, the court denied the motion "[for] lack of proof."

Thomas' motion for reconsideration was denied. He filed an appeal from the court's March 11, 2002 order. Both of his appeals have been consolidated.

DISCUSSION

I. Motion to Set Aside 1967 and 1968 Judgments

Thomas acknowledges that he waited decades to bring his motion to set aside the 1967 interlocutory judgment of divorce and the 1968 final judgment of divorce.[3] But he asserts that under Code of Civil Procedure section 473, subdivision (d), a void judgment may be set aside at any time.

A judgment is void if the court rendering it lacked subject matter jurisdiction or jurisdiction over the parties. (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691.) A judgment is also void if the court grants relief which it has no power to grant. (*Ibid*.) Collateral attack of such judgments is disfavored, even when the judgment is unauthorized by statute. (*Ibid*.) A trial court's denial of a motion to vacate a judgment is reviewed for an abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

Thomas claims the divorce judgments are void on three separate grounds: (1) the parties' reconciliation barred entry of the interlocutory and divorce judgments, (2) the judgments are void on their face because he was not present at the trial, and (3) the judgments were in excess of the court's jurisdiction. None of these contentions has merit.

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[3] An interlocutory judgment represented a final judicial determination that the parties were entitled to a divorce. (*Borg v. Borg* (1938) 25 Cal.App.2d 25, 29.) The law at the time required an intervening year between entry of the interlocutory judgment and the final divorce decree (see former Civ. Code, § 132) "to permit the determination of the paternity of children" and "to permit, if possible, the husband and wife to compose their difficulties and become so reconciled to one another that the marital relations may be resumed and no final decree of divorce become necessary." (*Lane v. Superior Court of Fresno County* (1930) 104 Cal.App. 340, 345.)

A. Reconciliation of the Parties

Thomas argues that the parties' reconciliation prior to entry of the interlocutory judgment barred entry of the judgment and the final judgment of divorce.

The judgments in this case were rendered prior to enactment of the Family Law Act in 1970 (formerly Civil Code section 4000 et seq., now the Family Code), which instituted no-fault divorce in California. Under then-existing law, reconciliation or "condonation" prevented a final divorce decree under former Civil Code section 111. Condonation was defined as the conditional forgiveness of a matrimonial offense constituting a cause of divorce (former Civ. Code, § 115), and the required elements were (1) knowledge on the part of the condoner of the facts constituting the cause of divorce, (2) reconciliation and remission of the offense by the injured party, and (3) restoration of the offending party to all marital rights (former Civ. Code, § 116).

"'When parties become reconciled after an interlocutory decree and live together as husband and wife, the right to a final decree is destroyed [citations], and they are entitled to such rights as arise from the legal relation of husband and wife. [Citations.]'" (*Cochran v. Cochran* (1970) 13 Cal.App.3d 339, 346 (*Cochran*).) "Where there has been a bona fide unconditional reconciliation, neither party can compel the entry of a final decree. [Citations.] It is proper to set aside the interlocutory decree and dismiss the action [citations], and a new action for divorce may be brought upon a cause for divorce arising after the reconciliation." (*Ibid*.) "If one party fraudulently secures a final decree despite such a reconciliation the final decree *may* be set aside." (*Ibid*.; italics added.)

Although the parties could not recall the exact dates of their reconciliation, the record is clear that it took place *prior* to entry of the interlocutory order and that they were no longer living together by the time of the order. In all of the cases cited by Thomas for the proposition that a condonation prevented a divorce, the period of reconciliation took place after entry of the interlocutory order. In *In re Marriage of Modnick* (1983) 33 Cal.3d 897, the wife argued that a reconciliation, like the one here,

which occurred prior to the interlocutory decree was also a ground for setting aside the divorce decree. The court disagreed, noting the "well-settled rule" that interlocutory divorce decrees are res judicata to all questions determined therein. (*Id*. at p. 911, fn. 13.) The court found that where the complaint had alleged irreconcilable differences, "the interlocutory judgment conclusively determined that irreconcilable differences existed between Marilyn and Zelig at that time. Marilyn may not relitigate that issue." (*Ibid*.) Similarly here, Donna's complaint sought a divorce on the grounds of Thomas' "extreme cruelty" and the interlocutory judgment found that she was entitled to a divorce on her complaint.

Moreover, none of the authorities cited by Thomas stands for the proposition that a divorce decree which has been entered in the face of a reconciliation or condonation is per se void. To the contrary, the cases suggest that a condonation even subsequent to an interlocutory judgment is merely a ground for setting aside the final divorce judgment. The distinction is important. "[W]here, after the rendition of the interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation by the parties, the entry of the final decree ceases to be a ministerial act only, and becomes a judicial act in the performance of which the trial court *may use its discretion*." (*Lane v. Superior Court of Fresno County*, *supra*, 104 Cal.App. at pp. 344-345.)

Finally, Thomas did not prove a condonation. The burden of proof rests with the party asserting the fact of reconciliation. (*Cochran*, *supra*, 13 Cal.App.3d at p. 347.) "'[A] reconciliation and a resumption of marriage relations are not always the same. A resumption of marital relations does not result in a reconciliation unless or until the parties mutually intend to reunite permanently as husband and wife [citations] and there is an unconditional forgiveness by the prevailing party. [Citation.]'" (*Ibid*.) Under former Civil Code section 118, where the cause of divorce was cruelty, "cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation" unless "accompanied by an express agreement to condone." Whether an

agreement is an unconditional one of forgiveness is a question of fact. If the evidence, or the reasonable inferences therefrom, is conflicting, the determination of the question by the trial court is conclusive on the appellate court. (*Cochran*, at p. 347.)

Here, Thomas asserts that Donna forgave him, cohabitated with him and had his third child. But there is nothing in the record to suggest that Donna forgave his acts of cruelty. Indeed, in support of this contention in his motion below, Thomas pointed to an earlier declaration of Donna, in which she called their attempted reconciliation temporary and stated that his acts of cruelty continued during that time. Furthermore, the fact of cohabitation, even for a significant period of time, is also insufficient to establish a reconciliation. (*In re Marriage of Modnick*, *supra*, 33 Cal.3d at p. 912, citing *Waller v. Waller* (1970) 3 Cal.App.3d 456, 462-463 and *Kelley v. Kelley* (1969) 272 Cal.App.2d 379, 382.) Finally, the fact that the parties had another child merely indicates they had sexual intercourse, which is also insufficient to establish a reconciliation. (*Schletewitz v. Schletewitz* (1948) 85 Cal.App.2d 366, 371.)

B. Lack of Notice of Trial Date

Thomas also argues that the interlocutory judgment is void on its face because the record discloses he was not given proper notice of the trial date. Pursuant to Code of Civil Procedure section 594, subdivision (a), and former subdivision (1) in effect at the time of the judgment, notice of a trial is mandatory, and a judgment made after trial without proper notice "is not merely error; it is an act in excess of the court's jurisdiction." (*Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 577; *Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963-964.) Defective notice can be cured by the party's appearance at trial. (*Elder v. Justice's Court of Third Township* (1902) 136 Cal. 364, 366-367.)

In determining whether an order is void on its face we are limited to a consideration of matters which appear in the judgment roll or are admitted by the parties. (*Phelan v. Superior Court of San Francisco* (1950) 35 Cal.2d 363, 372-373.)

The judgment roll here consists of the pleadings and the interlocutory judgment. (See Code Civ. Proc., § 670, subd. (b).) The interlocutory judgment specifically indicates that Thomas and his attorney were present in court on October 11, 1967, the date of trial.

In his moving papers below, Thomas acknowledged that a challenge to a judgment as being void on its face is limited to "examination of the judgment roll, without resort to extrinsic evidence." But on appeal, he pays little attention to this rule in his opening brief, relying on evidence outside the judgment roll. In his reply brief, Thomas argues that the minute order dated October 11, 1967, which contradicts the interlocutory judgment by reflecting that Thomas and his attorney were not present at trial, should be considered by us because the minutes were "admitted" by the parties. He claims this is so because he requested that the trial court take judicial notice of the minutes and that "Donna herself relied upon those minutes in her redirect examination." But the portions of the record to which Thomas cites relate to his equitable motions that were pending in a different department before a different judge and were not part of his motion to set aside the judgments as void. With respect to the instant motion, the only request for judicial notice made by Thomas related to the notice of trial served by Donna's attorney, not the minute order, and this request was denied by the trial court as untimely.[4]

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[4] The court also found to be untimely Thomas' reply papers, which he claims was an abuse of discretion. The proof of service indicates that these papers were served by express mail on March 5, 2002, six days before the hearing on March 11. Under Code of Civil Procedure section 1005, subdivision (b), reply papers must be filed and served at least five calendar days before the hearing, but under Code of Civil Procedure section 1013, subdivision (a), such time must be extended by two court days when served by express mail. Thus, the trial court was correct in finding that Thomas' papers were untimely. Interestingly, Thomas' reply declaration, in which he affirmatively states for the first time that he was not in court on October 11, 1967, is not identified in the list of documents Thomas presented to the court, nor does the copy in the record on appeal contain a proof of service or file stamp.

Although the record discloses that Donna filed a request for judicial notice of the minute order, the record does not indicate whether the court granted this request. The minute order directly contradicts the interlocutory judgment in terms of whether Thomas and his attorney were present at trial. But on collateral attack of a judgment, every presumption is in favor of the validity of the judgment. (*Phelan v. Superior Court of San Francisco*, *supra*, 35 Cal.2d at pp. 373-374.)

C. Excess Judgment

Thomas also argues that the judgments were void because they included support for a third child when the parties only had two children at the time Donna filed her complaint. Thus, he claims that the court's order of support for the third child was in excess of the demand in the complaint and was therefore in excess of the court's jurisdiction.[5]

The parties both cite us to Code of Civil Procedure section 580. At the time of the judgments, section 580 provided: "The relief to be granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

Here, Donna's complaint alleged that the parties had two children. In the general prayer for relief section of her complaint, she requested that Thomas "be ordered to support Plaintiff and the minor children of the parties." Thomas filed an answer to the complaint in which he prayed that Donna take nothing by her complaint. Thus, under Code of Civil Procedure section 580, the court could grant child support for each child because such relief was consistent with the prayer for child support and

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[5] Thomas also argues that Donna was not entitled to a judgment of divorce because both parties admitted in their pleadings that they were not validly married and the judgment was therefore in excess of the court's jurisdiction. Thomas did not raise this issue below and we therefore deem it to be waived.

was embraced within the issue of support. Indeed, even where no answer was filed, the courts have developed an exception to section 580, beginning with *Cohen v. Cohen* (1906) 150 Cal. 99. In *Cohen*, the wife's complaint requested a divorce on the ground of extreme cruelty, but made no request for alimony. Her husband failed to answer or appear. The Supreme Court held that even though section 580 stated that relief may not exceed what is demanded in the complaint, "[it] does not make the judgment void in a case where the relief given is *within the terms of a prayer for general relief* and is germane to the cause of action stated, although it may not be authorized by the facts alleged. In such cases the judgment may be erroneous as to the excess and subject to reversal or modification on appeal, but it is not void, nor subject to collateral attack on that ground." (*Cohen*, at p. 102; italics added.)

In other dissolution cases in which child support or alimony was ordered in the absence of a demand in the complaint, the Supreme Court similarly reasoned that where support was concerned a prayer in the complaint seeking general relief necessarily placed a defendant on notice to anticipate the possibility that an award for support or alimony will be made, even though not requested. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1168, citing *Bowman v. Bowman* (1947) 29 Cal.2d 808, 812; *Miller v. Superior Court of Los Angeles* (1937) 9 Cal.2d 733, 740; *Karlslyst v. Frazier* (1931) 213 Cal. 377, 381; *Parker v. Parker* (1928) 203 Cal. 787, 792-793.) The Supreme Court held in these cases that the judgments awarding support were subject to attack on direct appeal as erroneous judgments, but were not void and thus were not subject to collateral attack. (*Ibid*.)

The *Lippel* court held that the *Cohen* exception was no longer applicable after enactment of the Family Law Act in 1970 and the mandatory requirement that petitions for dissolution be filed on standard judicial council forms in which the petitioner must check off boxes that put the respondent on notice of the specific relief being sought. (*In re Marriage of Lippel*, *supra*, 51 Cal.3d at p. 1170.) But at the time Donna filed her complaint, no such forms existed and the *Cohen* exception was in

force. Because Donna's complaint prayed for child support, the interlocutory and divorce judgments awarding support for all three of the parties' children are not void.

II. Motion for Equitable Relief

Thomas contends the trial court abused its discretion in denying his motion for equitable relief, to fix arrearages and to quash arrears on four grounds: (1) the court erred in denying his defenses of laches and lack of diligence and finding that he had unclean hands, (2) the court erred in denying his request that his case be reviewed by a superior court judge, (3) the court erred in denying his request for a statement of decision, and (4) the court was biased against him and should have declared a mistrial. None of these contentions has merit.

A. Laches and Unclean Hands

In 1967 and 1968 when the judgments in this case were entered, money judgments were enforceable for a period of 10 years, and where support judgments were payable in installments the period of enforceability ran as to each installment from the date the installment became due. (*In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 468.) But installments more than 10 years overdue could still be enforced at the discretion of the trial court upon noticed motion, subject to a lack of diligence defense. (*Id*. at pp. 468, 470.) "[I]n 1992 and 1993, the Legislature enacted legislation making all support orders enforceable at any time, eliminating the need to renew judgments awarding support and effectively eliminating the diligence defense in support cases. (Former Civ. Code, § 4384.5, now Fam. Code, § 4502.)" (*In re Marriage of Garcia* (2003) 111 Cal.App.4th 140, 145.) Thus, pre-1993 support judgments that were not enforced during the statutory time frame remained extant and enforceable as a matter of right. (*In re Marriage of Cutler*, at p. 474; *In re Marriage of Garcia* (1998) 67 Cal.App.4th 693, 697-698.)

Effective January 1, 2003, the Legislature amended Family Code section 4502 to eliminate the equitable defense of laches in actions to enforce support judgments. (Fam. Code, § 4502, subd. (c).) Because this amendment was a change in the law, it does not apply retroactively to cases heard before that date. (*In re Marriage of Garcia*, *supra*, 111 Cal.App.4th at p. 148.) Here, the hearing and ruling on the child support arrearages took place in 2002 before enactment of the amendment. Thus, the defense of laches was available to Thomas.

Laches is an equitable defense to the enforcement of stale claims. (*In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1359 (*Fogarty*).) It may be applied where the complaining party has unreasonably delayed in the enforcement of a right, and where that party has either acquiesced in the adverse party's conduct or where the adverse party has suffered prejudice rendering the granting of relief unfair or inequitable. (*Ibid.*; *In re Marriage of Garcia*, *supra*, 111 Cal.App.4th at p. 144.) Moreover, a party requesting equitable relief must come into court with clean hands. (*Fogarty*, at p. 1366.)

Case law is split on the correct standard of review of a ruling allowing or disallowing laches as an affirmative defense. Some authorities hold that the trial court's decision should be reviewed for abuse of discretion, while others have employed a substantial evidence test and at least one case has used a mixed standard. (See *Fogarty*, *supra*, 78 Cal.App.4th at p. 1364, and cases cited therein.) In *Fogarty*, this division concluded that the appropriate standard of review is abuse of discretion. (*Ibid*.) Under this standard, we are obliged to assume that the judgment is correct. (*Ibid*.) All intendments and presumptions are indulged in favor of the judgment and any conflicts in competing facts are resolved in favor of the judgment. (*Id*. at p. 1365.) It is the appellant's burden to prove that, under consideration of the entire circumstances of the case, the trial court's decision exceeded all bounds of reason. (*Ibid*.)

In both her declaration in opposition to Thomas' motion and in her testimony in court, Donna attributed her delay in enforcing the support judgment to her fear of Thomas. He was violent and she never knew what he was going to do. She testified as to repeated instances of Thomas' physical abuse of her during their marriage: He slapped her around while she was pregnant; he would knock her down and kick her; he threw a bottle of shaving cream at her head which required stitches; he ripped an earring out of her pierced ear; he fired a rifle in the house in her direction; he punched her in the stomach after she had had surgery on her ovary; he told her mother he would kill Donna; he threw a television set into a plate glass window that landed outside the house; and he punched holes in the walls in the house. Only through the passage of time, counseling and the emotional and financial support of others was she able to commence enforcement proceedings.

Thomas claims the evidence presented by Donna was not credible and did not support the court's disallowance of the laches defense. But the trial court specifically found that Donna's evidence was credible and supported the findings that Thomas was an abusive spouse, had a violent temper, and was an erratic, inappropriate, and, in some instances, abusive parent. We are bound by the trial court's assessment of witness credibility. (See, e.g., *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 925; *Johnson v. Pratt & Whitney Canada, Inc*. (1994) 28 Cal.App.4th 613, 622-623; *Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243.)

Thomas asserts that no case "has supported Donna's assertion that 'fear of violence' excused any attempt to collect support for more than three decades," and cites to *In re Marriage of Copeman* (2001) 90 Cal.App.4th 324 to support his position that the "passive wife" explanation is without merit. In *Copeman*, where a mother waited 12 years before pursuing child support increases under a modified support judgment, the trial court found that the doctrine of laches applied. (*Id*. at pp. 328, 333.) In affirming the order, the reviewing court noted that the trial court "may have rejected, or found unreasonable, Lesley's explanation that she delayed due to her

'passive personality,' desire to avoid involving her sons in a conflict, and ignorance of the district attorney's enforcement assistance." (*Id*. at p. 334.) But the appellate court did not set forth a rule that these facts were per se inadequate to defeat a laches defense. To the contrary, the appellate court found that "[o]n this record" the trial court did not abuse its discretion in finding the 12-year delay unreasonable. (*Ibid*.) Indeed, in *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, the appellate court reached the opposite conclusion. In that case, the mother waited nearly 30 years before bringing her action for child support arrearages. The mother's explanation for the delay was that she was afraid of her ex-husband because he had beaten her, her father and their son in the past and she was only able to commence the proceeding after obtaining emotional and financial support. (*Id*. at pp. 1159-1160.) The *Dancy* court found that "[b]ecause these reasons are supported by testimony in the record, even if contradicted by other testimony, we must defer to the trial court's implied finding that Kay's long delay was not unreasonable." (*Id*. at p. 1160.)

Like the mother in *Dancy*, Donna claimed that due to her fear of Thomas, it was only with the passage of time, counseling and the assistance of others that she was able to find the courage to engage the services of a lawyer to assist her in collecting child support arrearages. Donna retained this lawyer in 1983, but she never followed up with him. In 1986 she learned he had been disbarred and had done little work on her case when the State Bar of California returned her file to her. There is no evidence that Donna attempted to hire a new lawyer upon learning of the disbarment. The next step she took in her collection efforts was to contact the FSO in 1999. During this time, Donna was living with her fiancé, the parties' children had become adults, and Donna had little contact with Thomas. Even assuming it was reasonable for Donna to delay her collection efforts until the early to mid-1980's when she found the courage to pursue collection efforts, we find that it was unreasonable as a matter of law for her to wait another 13 years to take any further affirmative steps.

Nevertheless, we recognize that in order to prevail on a defense of laches, Thomas must also establish that he was prejudiced by Donna's unreasonable delay and that he had clean hands. (*Fogarty*, *supra*, 78 Cal.App.4th at p. 1366.) Thomas claims the trial court's findings that he was not prejudiced by Donna's delay and that he had unclean hands were an abuse of discretion. We disagree.

Thomas asserts that he was prejudiced because he did not keep records of his payments, he does not remember his payments, his mother and other witnesses to his payments have died and he cannot obtain detailed information on his payments. The court found that Thomas' testimony that he made child support payments was not only "vague" and "contradictory" but "highly improbable," and that it was "credibly rebutted" by the testimony of Donna and the children. Our review of the record supports the finding that Donna and the children testified to the absence of any on-going payments or appreciable support by Thomas, and, as noted above, we are bound by the court's credibility determinations. In *In re Marriage of Dancy*, *supra*, 82 Cal.App.4th 1142, the father argued that he was prejudiced by his ex-wife's delay in seeking enforcement of a support order because he no longer had proof of past child support payments, his canceled checks were lost or destroyed, and his bank did not retain records older than seven years. (*Id*. at p. 1160.) The reviewing court noted that while this may have been a valid consideration, the trial court heard the testimony in this regard and impliedly rejected it by not finding laches applicable, a finding the *Dancy* court affirmed. (*Ibid*.) Similarly, we conclude the trial court, who heard the parties' and the witnesses' testimony, did not abuse its discretion in finding that Thomas suffered no prejudice by the absence of witnesses now deceased or the lack of proof of past payments.

Likewise, the record supports the trial court's finding that Donna's delay was outweighed by Thomas' unclean hands. There was ample testimony that Thomas was physically and emotionally abusive toward Donna and the children; that he failed to adequately provide for the children during their minority forcing Donna to work two

jobs at times, to resort to welfare for a time, to seek financial assistance for the children's school lunches and to change residences when she could no longer afford the rent. At the same time, Thomas lived in the same house for 25 years and drove luxury cars; he did not visit the children regularly and in particular did not spend much time with the parties' daughter; and he introduced his sons to marijuana when they were minors. The court's finding of unclean hands was not an abuse of discretion.

Accordingly, the trial court's rejection of the laches defense was not an abuse of discretion.

B. Family Code section 4251

Thomas claims he was never informed that a commissioner would hear his case, that he did not consent to proceed before a commissioner and that he timely requested judicial review of any findings made by the Title IV commissioner. He claims the denial of his request constituted reversible error. He is mistaken.

Family support cases must be referred to a child support commissioner. (Fam. Code, § 4251, subd. (a); *County of Orange v. Smith* (2002) 96 Cal.App.4th 955, 961.) "Section 4251, subdivision (b) provides in relevant part, 'The commissioner *shall act* as a temporary judge unless an objection is made by the local child support agency or any other party.' (Italics added.) Subdivision (c) explains, 'If any party objects to the commissioner acting as a temporary judge, the commissioner may hear the matter and make findings of fact and a recommended order. Within 10 court days, a judge shall ratify the recommended order unless either party objects to the recommended order, or where a recommended order is in error. In both cases, the judge shall issue a temporary order and schedule a hearing de novo within 10 court days.' In other words, one must object to a commissioner twice (before and after the commissioner rules in the case) to have the matter reviewed by a superior court judge." (*Smith*, at p. 961.)

Here, the only portion of the record Thomas cites to support his position that he made a timely objection to the commissioner and request for judicial review is the following exchange with Commissioner Lee on February 14, 2002, which undermines his claim: "Ms. Pechner [Thomas' attorney]: Secondly, we have requested that the Court hear this and do the Findings and Order. . . . [¶] The Court: Just a moment. Did you bring that up at the previous proceedings? The 4251(c)? [¶] Ms. Pechner: Yes. We brought it up at the previous proceedings, and we've also said here. And I believe that if it's covered by the Statement of Decision, I think that will probably be sufficient Your Honor. [¶] Mr. Lew [Donna's attorney]: Your Honor, I don't believe that was brought up is my recollection. [¶] The Court: I don't remember it either. . . . [¶] Mr. Lew: As I recall, Your Honor, I believe the parties and counsel -- the parties had signed the green sheet the last time we were here in December. [¶] The Court: Well, the green sheet is not determinative, Mr. Lew; what is determinative is if it's stated at the beginning of the proceeding that one of the parties wishes to invoke Family Code section 4251(c). [¶] But that must be made at the very inception of the proceedings, otherwise it's deemed waived. [¶] Mr. Lew: If it please the Court, we have been here before Your Honor twice. Once we were here on August 1st -- [¶] The Court: I'm looking at the Court's written findings from August 1st, 2001; there was no statement at that time. Let me just . . . . April 9th, 2001; April 3rd; December 14th. [¶] Mr. Lew: I believe that was December 13th, Your Honor, if I'm not mistaken. [¶] The Court: November 13th, 2000; October 23rd, 2000. [¶] I find no record of a statement that you wished to appear pursuant to Family Code section 4251(c); therefore, the Court finds the request is untimely."

Thomas cites no other record reference to establish that he timely objected to the matter being heard by a commissioner. Indeed, at the hearing which took place two months before the above-described exchange, Commissioner Lee reviewed the pleadings, entertained oral argument and issued a tentative order on Thomas' motion. We find no error here.

C. Statement of Decision

Thomas contends the trial court's denial of his request for a statement of decision constituted reversible error. We disagree.

Under Code of Civil Procedure section 632, upon the trial of a question of fact by the court, a statement of decision explaining the factual and legal basis for the court's decision as to each of the principal controverted issues at trial is not required unless requested by a party appearing at the trial "within 10 days after the court announces a tentative decision" and the request must specify the controverted issues to which a party is requesting a statement of decision. Failure to issue a statement of decision in response to a timely request therefor is reversible error. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659.)

The express language of Code of Civil Procedure section 632 requires a statement of decision only upon the "trial" of a question of fact by the court. The general rule is that section 632 does not require a statement of decision after a ruling on a motion, even if the motion involves extensive evidentiary hearings and the resulting order is appealable. (*Gruendl v. Oewel Partnership, Inc.*, *supra*, 55 Cal.App.4th at p. 660.) In his reply brief, Thomas points out that some courts have created exceptions to the general rule. In determining whether an exception should be created, courts balance the (1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings. (*Ibid.; In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.)

Thomas asserts that the record is devoid of findings of fact from the trial judge. To the contrary, despite the court's denial of his request for a statement of decision, the trial court here made several express factual findings. For example, the court found that Thomas' testimony regarding his support payments was vague, contradictory and highly improbable, that he was an abusive spouse and parent, had a

violent temper, was erratic and inappropriate and that it was not unreasonable for Donna to be fearful of him and to delay in seeking to recover child support arrears, that he was not prejudiced by her delay because other testimony credibly established that he had not made on-going support payments, and that he had unclean hands because he was abusive to Donna and the children, that he failed to adequately support the children despite his knowledge of a court order requiring him to do so and that his behavior with the children was inappropriate. Thus, the court made specific factual findings on each of the elements of laches, which greatly facilitated our review. No exception is necessary here.

D. Judicial Bias

Thomas argues that the trial court exhibited bias against him which precluded a fair hearing. Because this issue is not reviewable on appeal, we dismiss this portion of Thomas' appeal.

On April 19, 2002, Thomas filed a "Memorandum of Points and Authorities in Support of Statement of Disqualification of Judge" and his attorney's declaration. Thomas brought his statement under Code of Civil Procedure section 170.1, subdivision (a)(6)(C), which provides that a judge shall be disqualified if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. He claimed that the trial court was biased against him based on its participation in the contested evidentiary hearings on February 14 and 15, 2002 by making its own inquiry of the witnesses. On April 23, 2002, the trial court issued a verified answer to his statement and a three-page order striking the statement pursuant to Code of Civil Procedure section 170.4, subdivision (b), on the grounds that the statement on its face disclosed no legal grounds for disqualification.

Under Code of Civil Procedure section 170.3, subdivision (d), the determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of

appeal sought within 10 days of notice to the parties of the decision. The trial court's order specifically reminded Thomas of the requirement to seek a writ. Thomas failed to do so. We therefore dismiss this portion of Thomas' appeal.

DISPOSITION

The orders are affirmed. Respondent to recover costs on appeal.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, Acting P.J.

NOTT

_____, J.

ASHMANN-GERST